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No. 494

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

■

STANLEY JOHN FLAKOWICZ

Petitioner

v.

MYRL E. ALEXANDER

Respondent

■

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

HAYDEN C. COVINGTON

Counsel for Petitioner

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TO THE SUPREME COURT OF THE UNITED STATES:

Stanley John Flakowicz petitions this Court for a writ of certiorari. He shows unto the Court as follows:

Summary of Matters Involved

Opinion of the Courts Below

The opinion of the United States Circuit Court of Appeals for the Second Circuit is not yet reported in the Federal Reporter. It appears in the record. [60-65] [1] The opinion of the United States District Court for the District

[1] Bracketed figures appearing in this petition and supporting brief refer to pages of the printed appendix.

of Connecticut, stating extensively the reasons for sustaining the writ and discharging the petitioner, is reported (*United States* ex rel. *Flakowicz* v. *Alexander*) at 69 F. Supp. 181.

Jurisdiction

Jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule 38 of the Revised Rules of the Supreme Court of the United States.

Timeliness of This Petition

The judgment of the Circuit Court of Appeals was rendered and entered on November 6, 1947. [65-66] The petition for writ of certiorari is filed within three months from that date.

Statutes and Regulations Involved

Drawn in question by this petition is the construction and application of the Selective Training and Service Act of 1940, as amended [50 U. S. C. App. § 304 (a)], Selective Service Regulations, §§ 629 and 633, as amended January 10, 1944, by Amendments Numbers 200 and 207. (9 F. R. 440, 445) and Army Regulations 615-500 (e).

Questions Presented

The *principal* question presented here is whether petitioner, who did not report to the induction station according to the commands of a final order to report for induction, exhausted his administrative remedies upon his acceptance by the armed forces on a preinduction physical examination given within ninety days before he was ordered to report.

The following *incidental* questions are also presented:

1. Does the Act, as amended on December 5, 1943, making mandatory the preinduction physical examination, make

final the determination of physical and mental acceptability of the petitioner for training and service by the armed forces occurring within ninety days of the order to report for induction?

2. Are the Army Regulations, providing for another cursory physical inspection, and not for a complete physical examination, to determine the final acceptability of a registrant upon reporting for induction pursuant to the final order, invalid because in conflict with the Act of Congress requiring the determination of physical and mental acceptability of a registrant upon a preinduction physical examination prior to the issuance of an order to report for induction?

3. Is the interpretation placed upon the regulations by the court below *ultra vires* because the court authorized the armed forces to provide for examination to determine acceptability for training and service simultaneously with reporting for induction thereby departing from and conflicting with Act of Congress?

4. When properly construed, do the Act and Selective Service Regulations mandatorily make final the certificate of acceptance issued on a preinduction physical examination given within ninety days before the order to report for induction issues, thus completing the selective process before the order to report issued?

5. In failing to provide that a preinduction physical examination will be acceptable to the armed forces when given within ninety days of the order to report for induction, as required by the Selective Service Regulations, do the Army Regulations depart from and conflict with the Act and the Selective Service Regulations?

6. Did the taking of the preinduction physical examination, which resulted in petitioner's being declared acceptable for training and service by the armed forces within ninety days before he was ordered to report for induction,

constitute an exhaustion of his administrative remedies sufficient to entitle him to challenge the validity of the classification and proceedings followed by the administrative agency in denying him his claim for exemption as a minister of religion?

The following *subsidiary* question arises in event this Court holds that petitioner has exhausted his administrative remedies sufficiently to entitle him to challenge the validity of the order to report in his defense against the indictment:

Is petitioner entitled to discharge upon writ of habeas corpus because of the denial by the convicting court of his right to be heard in his defenses, if he exhausted his administrative remedies, inasmuch as he pursued and completed the appellate course exhausting his judicial remedies in the criminal proceedings prior to commitment?

Statement of Case

FORM AND HISTORY OF ACTION

This civil action was begun by filing a petition for writ of habeas corpus in the name of the United States of America upon the relation of John Flakowicz, father of petitioner. It alleged that petitioner was illegally restrained of his liberty under a judgment and commitment of the United States District Court for the Eastern District of New York based upon an indictment charging petitioner with an alleged violation of the Selective Training and Service Act of 1940, as amended, by failure to report for induction into the armed forces after being ordered to report at the induction station. [8-26]

The district court issued the writ of habeas corpus. [31-32] The warden filed his return. [33-49] Evidence was received. [1] The case was argued, at the conclusion of which the court sustained the writ of habeas corpus and

discharged petitioner from custody of the respondent. [1, 2, 52-53] The trial court wrote an opinion in which his reasons for discharging petitioner were fully stated. [40-46] The trial court entered findings of fact and conclusions of law, as well as the judgment. [2, 47-51] Application was made to have petitioner admitted to bail pending a disposition of appeal by respondent. [2] Bail was allowed by the court. [2, 52-53] Notice of appeal was duly filed by respondent. [54]

FACTS[2]

Stanley John Flakowicz registered with Local Board 252, Forest Hills, Queens County, Long Island, New York, on December 21, 1942. (16, 33) [3] On January 12, 1943, the local board mailed him a Selective Service questionnaire (33, 98) which he properly filled out and returned showing he was 18 years of age, had completed eight years of elementary school and four years of high school and for six years had attended the Watchtower divinity school in preparation for the ministry. (33, 98-99) He showed that he was working as an ordained minister of the gospel under direction of the Watchtower Bible & Tract Society, publishers for Jehovah's witnesses; that the kind of work he did was preaching the gospel of God's Kingdom, in which he had three and one-half years' experience, and to which he had devoted his full time since November 1, 1942, and that he had not been engaged in any other job. (99-100) He showed his usual occupation as an ordained minister and preferred

[2] For an abbreviated statement of facts in respect to the history of petitioner's case before the administrative agency, see findings of fact and conclusions of law of the district judge. [47-50]

[3] Figures appearing in parentheses herein refer to pages of the printed transcript of the record of the criminal trial of petitioner, received in evidence in the trial court below, and used by the judge in the preparation of his findings of fact and conclusions of law.

his ministerial work and no other. (100) He acted as a regular unordained minister from 1939 to 1942. (28, 107) He stated he was a minister of religion, customarily served as a minister and had been formally ordained on June 12, 1942. (28-30, 100-101)

Petitioner claimed classification of IV-D. (101, 106-107, 109) Upon the evidence the local board classified him in Class IV-D, granting his exemption from all training and service as an ordained minister on January 29, 1943. (21) The card advising him of this classification was received through the mail on February 3, 1943. (33)

On August 31, 1943, the local board received an *anonymous* letter stating that petitioner falsely stated his claim, willfully took the name of the organization to dodge the draft and entered "pioneer" work after graduating from hig school as a foundation for deferment, and complained about his exemption while other men were being drafted. (117) On September 27, 1943, petitioner appeared before the local board for a hearing with reference to his classification at the request of the local board. (119, 122) On such date his classification was changed from IV-D to I-A. (22) On October 1, 1943, he received card notifying him of the change of classification. (34) At the time his classification was changed, there was no change in his status. At the time he was classified in IV-D as well as when he was placed in I-A, he was discharging his ministerial duties and devoting substantially his full time to the furtherance thereof. (34)

On October 5, 1943, the local board received a letter dated September 25, 1943, signed by Rose Boulette, stating that Flakowicz was eligible for the draft and had been 'pulling the wool over the board's eyes'. She complained about his having a IV-D classification and stated that he should be placed in I-A immediately and that if his classification was not changed she would report the matter to the Director, Lewis B. Hershey. (118)

On October 7, 1943, Flakowicz requested a personal appearance. (119-120) On October 13, 1943, he appeared before the local board (122-123) and filed additional evidence showing conclusively that he was entitled to Class IV-D and that the local board had no authority to change his classification. (120-122) On October 15, 1943, after the board continued his I-A classification, he filed his appeal. (122, 123) With his appeal, additional evidence was submitted proving his ministerial capacity, and answering the charges against him filed with the local board. (122-132) With this additional statement were filed affidavits from John R. Anderson, Milton G. Henschel, M. G. Friend and T. G. Jewulski showing that petitioner stood in the same relationship to Jehovah's witnesses as do the orthodox clergy in relation to their congregations as ministers of religion. (133-136) He also submitted a statement signed by seventy-four persons that he had been serving as a full-time minister as one of Jehovah's witnesses and that he performed functions and ceremonies normally performed by duly ordained ministers of other religions. (137) The board of appeal continued his I-A classification on November 1, 1943. (17, 36)

On November 15, 1943, Flakowicz duly requested the Director of Selective Service to review his classification. (138-139) On November 16, 1943, the Director of Selective Service suspended induction process (141-142), but thereafter refused to take an appeal in behalf of petitioner. (142-143) The file was returned to the local board. (143-144) The local board asked petitioner if he desired to be inducted as a conscientious objector. (144-145) Petitioner answered that he claimed only classification as a minister and would not make the requested choice, but emphasized his sincere objection to military service. (145) On January 25, 1944, he wrote a letter to the President of the United States reviewing his controversy with the local board and requesting that a Presidential appeal be taken

to avoid an injustice. (148-151) This letter was referred to the New York City Director of Selective Service, who answered it on February 2, 1944, declining to take further action. (151)

On January 27, 1944, petitioner was notified to appear for preinduction physical examination on January 31, 1944. (18, 146-148) He complied and was found acceptable by the army for general military service. (18, 102-103) Thereafter the local board advised him he had been found acceptable. (38)

On February 19, 1944, petitioner renewed his appeal to the President for relief. (152-154) His letter was once more referred to the New York City Director of Selective Service, who again declined to take action for the reasons stated in his previous letter of February 2, 1944. (155)

On February 25, 1944, the local board notified petitioner to report for induction at 7:15 a.m. March 8, 1944. (103-104) On March 7, 1944, he wrote the local board acknowledging receipt of the order, refusing his claim for exemption, and charged the board with violating the law and stated that he owned no duty to report because the board had exceeded its authority. (105) He refused and failed to report for induction because he believed he was exempt as a minister of religion, that the board arbitrarily and capriciously classified him, exceeded its authority and violated the Act and Regulations. Since he had been accepted for duty he believed the administrative process had been completed so as to entitle him to challenge in court the legality of the classification. (38-39)

The criminal action was begun by indictment returned against petitioner, Stanley John Flakowicz, in the United States District Court for the Eastern District of New York on March 8, 1944. (3, 5-6) Petitioner was charged with failing to perform a duty required of him under the Selective Training and Service Act of 1940 and the Regulations promulgated thereunder in that he "did unlaw-

fully, wilfully and knowingly fail and neglect to report for such induction in the time and place fixed in said notice". (6)

Petitioner urged a motion to quash (7-8) which was denied. (12) Upon a plea of "not guilty" (3) a trial to a jury began on May 29, 1944, before the Honorable Clarence G. Galston, United States District Judge. (13) The evidence was concluded May 29, 1944. (39-40) At the close of all the evidence, petitioner moved for a dismissal of the indictment, a judgment of acquittal and direction of a verdict of "not guilty" in which the reasons were stated extensively. (40-43) On denial thereof petitioner excepted. (43) At the close of all the evidence petitioner submitted to the court his requested charges. (67-97) Counsel for petitioner summed up the evidence. (43-53) Counsel for the Government summed up the evidence. (54-55) The court charged the jury. (55-61) Petitioner objected and excepted to the court's charge. (61-65) All of petitioner's requested charges were refused and exceptions allowed. (61, 67-97) The jury returned a verdict of "guilty". (65) On May 29, 1944, the court remanded petitioner to custody until imposition of sentence on June 8, 1944. (66) Thereupon petitioner was sentenced to three years and committed to the custody of the Attorney General in such place of confinement as may be designated. (4-5) 55 F. Supp. 329. On June 8, 1944, petitioner served and filed his written notice of appeal. (4, 156-159) He timely filed his assignments of error which supported each ground of his appeal to the United States Circuit Court of Appeals from the judgment of conviction. (159-172)

Upon appeal the Circuit Court of Appeals affirmed the judgment of conviction. 146 F. 2d 874. Subsequently petitioner applied to this Court for a writ of certiorari to review the conviction and judgment of affirmance, which was denied. 325 U. S. 851.

How Issues Raised

The issues were raised by the petition for writ of habeas corpus, the return of the warden and the order of the court below. [8-26] In the petition for writ of habeas corpus, petitioner contended that upon the trial of the indictment before the jury in the District Court for the Eastern District of New York, he was denied his constitutional right of a fair trial and the right to be heard in his defense, contrary to the Constitution. [9-10, 18-19] It was contended that the convicting court denied him due process of law by holding that he was not entitled to challenge the validity of the order commanding him to submit to induction, and in refusing him the right to offer evidence to show the invalidity of the order. [9-10, 18-19] By reason of this action of the convicting court, it was claimed that he was penalized contrary to the due process clause and being denied his defense to the indictment. [18-19] It was contended that the court transferred the judicial power of the court to the draft board, denying him his right of trial by jury, refusing him the right to a judicial trial and abridging his liberty, contrary to the due process clause of the Fifth Amendment to the United States Constitution. [22] Moreover, it was alleged that the Act and Regulations had been transformed into a bill of attainder, contrary to Clause 3, Section 9 of Article I of the United States Constitution. [22-23]

The trial court held that the action of the convicting court, which was affirmed by the court of appeals and certiorari denied by this Court, constituted grounds for discharge upon a petition for writ of habeas corpus. The trial court said that the petitioner had exhausted his administrative remedies and pursued his judicial remedies to the limit. The court held that the denial to the petitioner of his right to be heard on his defenses was serious error

justifying the discharge of petitioner upon the writ of habeas corpus. [40-46, 50-51]

The court of appeals held that petitioner failed to exhaust his administrative remedies. That court decided that the taking of the preinduction physical examination within ninety days of the date petitioner was ordered to report for induction did not finalize his acceptance sufficient to exhaust the administrative remedies. The court of appeals concluded that the rule of *Falbo* v. *United States* (320 U. S. 549) applied rather than the rule of *Dodez* v. *United States* (329 U. S. 338). [60-65, 64-65]

Specification of Error

The court of appeals erred in reversing the judgment and order of the district court and in directing that petitioner be remanded to the custody of respondent and in holding that petitioner's detention was valid.

Reasons Relied on for Granting the Writ

The decision of the court below conflicts with *Cahoon* v. *United States* (CCA-5) 155 F. 2d 150; *Turner* v. *United States* (CCA-5) 157 F. 2d 520; and *Wells* v. *United States* (CCA-5) 158 F. 2d 932, holding implicitly that the administrative remedies had been exhausted upon the taking of the preinduction physical examination even though given more than ninety days before the order to report for induction was issued. Cf. *Hudson* v. *United States* (CCA-10) 157 F. 2d 782, and *United States* v. *Balogh* (CCA-2) 160 F. 2d 999, where it was held that the taking of the preinduction physical examination more than ninety days from the date of the issuance of the order to report for induction did not constitute an exhaustion of the administrative remedies because beyond that period the acceptance upon preinduction physical examination was not final.

There is an important question of federal law presented in this case which has not been, but which should be, decided by this Court. Do the December 5, 1943, amendment to the Selective Training and Service Act of 1940, as amended (15 Stat. at L. 599) and the Selective Service Regulations providing for preinduction physical examinations to determine acceptability of a registrant "before he is ordered to report for induction", make final the acceptance of a registrant on such examination within ninety days of the date he is ordered to report for induction, and invalidate Army Regulation 615-500, paragraph 15 (e)?

The court below improperly held that they did and improperly concluded that the Act and Selective Service Regulations did not excuse the petitioner from complying with the order.

An important question of federal law which has not been, but which should be, decided by this Court is involved in this case. If this Court holds that Flakowicz has not exhausted his administrative remedies upon the preinduction physical examination, then is the act of the administrative agency, in ordering petitioner to report for induction before completion of the selective process, resulting in the forfeiture and deprivation of his right to exhaust his administrative remedies under the holding of this Court in *Falbo* v. *United States* (320 U. S. 549) such a drastic departure from due process of law as to entitle petitioner to challenge the order to report for induction as being void?

The decision of the court below, requiring the petitioner to report for induction in order to undergo a physical inspection with rejection a mere "possibility", stretches "the requirement of exhausting the administrative process beyond any reason supporting it". (*Gibson* v. *United States*, 329 U. S. 338, 67 S. Ct. 301, 307) The right to re-examination following the issuance of the order to report for induction, being *ultra vires* because of the amendment to the Selective Training and Service Act and the Regulations

thereunder, is in effect an optional rehearing which this Court has held unnecessary to resort to as a condition to judicial review of an administrative determination. *Levers* v. *Anderson,* 326 U. S. 219.

There is also involved in this case another important question of federal law which requires decision by this Court. In *Sunal* v. *Large* and *Alexander* v. *Kulick,* 67 S. Ct. 1588, petitioners were denied benefit of habeas corpus because they failed to appeal from the judgments of conviction.

Also it has been held that failure to apply to this Court for a writ of certiorari after an erroneous affirmance by the court of appeals justifies denial of discharge upon writ of habeas corpus. *Klopp* v. *Overlade,* 162 F. 2d 343; certiorari denied, 68 S. Ct. 83.

The opinion of the Court in *Sunal* v. *Large,* 67 S. Ct. 1588, supports the argument of the petitioner here that he is properly entitled to discharge on the writ of habeas corpus. Sunal and Kulick were denied the benefit of habeas corpus because they had failed to appeal. Here Flakowicz exhausted his appellate remedies. He appealed the judgment of conviction, which was affirmed by the court of appeals. (146 F. 2d 874) He applied to this Court for review by writ of certiorari, which was denied. (325 U. S. 851) The Court said: "Of course, if Sunal and Kulick had pursued the appellate course and failed, their cases would be quite different. But since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile." 67 S. Ct. 1588, 1592.

For each and every one of these reasons, together with the reasons discussed in the supporting brief, petitioner has shown substantial grounds for the granting of the petition for writ of certiorari hereinafter prayed for.

WHEREFORE your petitioner prays that this Court exercise its discretion by directing the issuance of a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, directing such court to certify to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the order of the Circuit Court of Appeals, reversing the judgment of the district court, be here set aside and held for naught; that the order of the district court be affirmed; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

STANLEY JOHN FLAKOWICZ, *Petitioner*

By
HAYDEN C. COVINGTON, *his Counsel*

SUPPORTING BRIEF

Preliminary

For a statement as to the opinion of the court below, the basis on which the jurisdiction of this court is claimed, the questions presented, the history of the action, how the issues were raised, the evidence received and rejected and the error relied upon, reference is here made to the foregoing petition for writ of certiorari.

ARGUMENT

The argument of petitioner here is epitomized by the opinion of the United States District Court in this case (*United States* ex rel. *Flakowicz* v. *Alexander*, 69 F. Supp. 181) where Judge Smith said:

"In the case at bar, unlike the *Smith* and *Estep* cases (1946) 327 U. S. 114, and the *Kulick* case (CCA-2) October 29, 1946, the petitioner refused to appear at the induction center. In that respect, it is similar to the *Falbo* case. However, at the time of Falbo's refusal to report, final determination of physical fitness and acceptability to the armed forces was made at the induction center following compliance with the order to report for induction. Subsequent to the *Falbo* case, however, the Congress required that final determination of physical fitness and acceptability to the armed forces be made upon request prior to the actual reporting for induction to avoid the hardship incident to the uncertainty of the regisrant's future entrance into the armed services until time of actual induction. *Act of December 5, 1943, c. 342, sec. 5, 57 Stat. 599.* It is true that the new requirement of Congress posed some administrative problems and led the Selective Service System to provide for cases in which examination, and determination of fitness, were not followed by induction

within a ninety-day period. However, it seems plain that the Congress was attempting, insofar as possible, to provide for the completion of the administrative determination of fitness and acceptability prior to the date of actual induction, and it would seem that in practically all cases the administrative process was actually terminated upon the issuance of the certificate of fitness. . . . The amendments to the Act and regulations ended the system of final determination of eligibility, and acceptability, at that time and place, and required that it be done at some time prior to the date of induction. . . . [¶] 'All had been done which could be done' by Flakowicz. The date of induction had arrived. True, the language of the *Falbo* and *Billings* cases appears to require actual reporting at the induction center. Yet both cases involved registrants ordered to report under the system in force prior to the Congressional provision of pre-induction physical examinations and the amendment to the regulations to conform to the Congressional directive. . . . [¶] Flakowicz had taken every possible step in the administrative process. On the morning of March 8, 1944, nothing had been done by the board or the director of Selective Service to reopen his classification or postpone his induction. The only function to be performed on that morning was submission to induction. Under those circumstances the Court will not require the empty gesture of reporting and refusing in person, instead of refusing by letter, in order to allow a testing of the legality of the classification." *United States* ex rel. *John Flakowicz* v. *Myrl E. Alexander, Warden,* Judge J. Joseph Smith.

The Selective Training and Service Act of 1940, as amended (§ 3 a) in part provides. " . . . no man shall be inducted . . . until he is *acceptable* to the land or naval forces . . . and his physical and mental fitness for such training and service has been satisfactorily determined." (Italics added) The administrative process beginning "with registration with the local boards" ends "when the registrant is *accepted*

by the Army, Navy or civilian public service camp." (Italics added) *Falbo* v. *United States,* 320 U. S. 549.

Section 629.1 of the Selective Service Regulations provides that "Every registrant, before he is ordered to report for induction, must be given a preinduction physical examination."

The purposes of the amendment to the Act cannot be defeated by regulations requiring physical examination simultaneously upon reporting for induction. The amendment to the Act mandatorily required that the certificate of fitness be issued before the order to report for induction was made.

Prior to the amendment to the Act eliminating the determination of acceptability simultaneously with reporting for induction, a great evil had developed through the interruption of the life and business of thousands if not hundreds of thousands of selectees ordered to report for induction who were discharged as physically unacceptable upon reporting for induction.

When the proposed amendment to the Act was being considered by the United States Senate, the following deliberations were had, as reflected by 89 Congressional Record, pages 8079, 8129-8133:

> Mr. BUSHFIELD [South Dakota]:
>
> . . . By way of explanation, let me say that most of the men whose classifications the Senate has been discussing have established homes, businesses, or professions. The record of the Selective Service indicates that forty and a fraction percent of all men called in the United States during the month of August [1943] were deferred because of physical defects. In fairness to the group of men who are about to be called if the proposed legislation is not passed, we should afford them every possible opportunity to ascertain in advance whether they will be accepted; because it will be

found that 4 out of every 10 men in the class which is to be called will be returned to their homes as unacceptable. In most cases those men will have either sold their businesses, closed their offices, or lost their jobs; and it is not fair to call them and later return them to their homes, if there is an opportunity to ascertain in advance whether they are acceptable. . . .

. . . Evidently the examination is of little value, because the induction center records show that a fraction over 40 percent of all persons examined at the induction centers are returned to their home as unfit.

I say to the Senate that, inasmuch as we have adopted the policy, it is unfair to the heads of families to force them to close their offices or give up their jobs before they are ordered to the induction centers. We should do everything possible to avoid the situation of having a man give up his job, but subsequently, because he does not pass the physical examination at the induction center, return to his home and have to look for a new job or have to open up another business.

Mr. CLARK of Missouri:

I think the pending amendment is an extremely meritorious one and certainly should be included in the bill. When I was at home I talked to a great number of draft officials, and the situation the Senator [Bushfield of South Dakota] has mentioned was brought up in a great many instances.

The result is that if a man has a little business or has a home on which he is paying, if he sells his business or tries to dispose of his home before he takes his examination and then is rejected for physical reasons or for any other reasons, he will be out of a job or will have disposed of his home. On the other hand, if he has passed the examination, he has only 3 weeks, in the case of the army, or 1 week, in the case of the

Navy, to dispose of his home or business, all of which simply means he gives it away.

Mr. BARKLEY [Kentucky]: Mr. President, I should like to say I think the proposal is meritorious and should be offered as an amendment to the bill. . . .

Mr. HILL [Alabama]: . . . We certainly ought not to do anything which would make any one examination final.

Much of the argument has been to the effect that insofar as possible the men who are rejected because of physical disabilities ought to be re-examined and taken into the army. . . . There ought not to be a final examination. As I have said, if a man is examined today, what would that examination be worth 6 months, 9 months, or perhaps a year from now?

Mr. BUSHFIELD: We are all pretty much burdened in this country today, and little more burden on a few doctors in the examining division in the induction centers will not hurt them any more than it hurts the boys who are being called.

Mr. BARKLEY: . . . If they are accepted for induction they go to an induction center and are subjected to a physical examination, under the regulations of the War Department, to determine whether they are fit.

Mr. BUSHFIELD: And 40 percent of them are sent back home.

Mr. BARKLEY: I understand, but if they are found fit, they are inducted.

Mr. BUSHFIELD: That is correct.

Mr. BARKLEY: The examination to determine their fitness takes place before they are inducted. . . . I have had my attention called to cases in which the local draft boards passed men. They went up to their induction centers, were examined, and rejected because of a more or less minor physical defect, which in all probability could be removed within 60 or 90 days, or

which might be cured by nature. They were told that they were not fitted at that time to enter the service, and therefore they were not inducted, but they were ordered to report back within 60 days, or told that they would be called back in 60 days or 90 days to determine whether by that time the physical defect had been removed. Under the terms of the Senator's amendment the examination before induction would be final. . . .

Mr. BUSHFIELD: It would be final only in the sense that it is final today, when the man is examined at the induction center and is rejected.

Mr. BARKLEY: It is not final. He may be examined time and time again.

Mr. BUSHFIELD: I know it is not final, because the local board may send him back to the induction center as many times as it sees fit.

We have been extremely solicitous of the welfare of everyone connected with the war effort. It seems to me that the men who are now being taken into the army under the new policy are entitled to a certain leeway if they want it. I ask Senators, in all seriousness, how many of them would be able to wind up their business affairs during 3 weeks. . . .

I do not believe the inductees particularly care whether the examination is a free one. They want an opportunity to know in advance whether they must lose their businesses, or their offices, or their jobs, before they are taken.

Mr. PEPPER [Florida]: That is what I had in mind. That is what all of us wish to see corrected. We wish to provide that a registrant may have as early an examination as it is possible to give him. . . .

Mr. SHIPSTEAD [Minnesota]: I have personal knowledge of several men who have suffered in consequence of the impracticable procedure which has been followed, and I think this is one of the most reasonable

provisions that has been offered for inclusion in the bill at any time.

Mr. BARKLEY: Mr. President, . . . I think that at the end of the amendment the words "shall be binding upon such board in the same manner as now followed upon examination after induction" should be changed to read: "Shall be binding upon such board in the same manner as now followed upon examination immediately prior to final induction." The words "immediately prior to final induction" would be substituted for the word "after", which appears in line 10 after the word "examination".

Mr. BUSHFIELD: I accept the suggestion . . . and ask that the modification in the amendment be made. . . .

Mr. BARKLEY: . . . I should not care to precipitate my examination if I thought I was going to be inducted, unless I was in a hurry to have it done so that I could enter the army. In those cases I suppose the examination would be facilitated, but if I were pretty certain that I could not stand the examination, and still was more or less suspended in mid-air until it was determined, I would naturally want to know what my status was going to be.

Mr. BUSHFIELD: I thank the Senator.

Mr. PEPPER: Mr. President, I should like to ask the Senator if he has in mind that the examination should be final for all time?

Mr. BUSHFIELD: No; no more than at present.

Mr. PEPPER: It is for the particular call?

Mr. BUSHFIELD: Yes.

Mr. PEPPER: So, if he were to be called again the previous examination would not be a finality?

Mr. BUSHFIELD: No, and the Selective Service and the draft boards can send a man back as many times as they want to.

The amendment to the Act, when finally approved by Congress, read as follows:

"Any registrant within the categories herein defined when it appears that his induction will shortly occur shall, upon request, be ordered by his local board in accordance with schedules authorized by the Secretary of War, the Secretary of the Navy, and the Director of Selective Service, to any regularly established induction station for a preinduction physical examination, subject to reexaminations.

"The commanding officer of such induction station where such physical examination is conducted under this provision shall issue to the registrant a certificate showing his physical fitness or lack thereof, and this examination shall be accepted by the local board, subject to periodic reexamination. Those registrants who are classified as I-A at the time of such physical examination and who are found physically qualified for military service, as a result thereof, shall remain so classified and report for induction in the regular order." 50 U. S. C. App. 303, 304 (a), 57 Stat. 596, 599.

It is manifest that it was the intention of Congress, in providing for the amendment to the Act, to eliminate entirely the practice of determining the final acceptability of a registrant simultaneously with reporting for induction.

The holding of the court below and the argument of the Government in this case perverts entirely the amendment to the Act and Regulations. That construction contended for would restore the evil practice of physical examination to determine acceptability given simultaneously upon reporting for induction. Certainly to allow the determination of final acceptability simultaneously with reporting for induction would be restoring the practice that was condemned by Senator Bushfield and extirpated by the amendment to the Act and Regulations discussed in *Billings* v. *Truesdell*, 321 U. S. 542, 554-555.

Petitioner was ordered to report for induction on March 8, 1944. [3, 49] At the time he was ordered to report

for induction, the preinduction physical examination required by the amendment to the Act had been established by Amendment No. 200, (9 F. R. 440-442) effective January 10, 1944. It provided that every registrant must be given a preinduction physical examination to determine acceptability by the armed forces before being called for induction. See Section 629 of Selective Service Regulations. The effect of these new regulations upon the selective process was discussed by this Court in *Billings* v. *Truesdell*, 321 U. S. 542, 544-555.

Amendment No. 200 (9 F. R. 440) promulgated on January 10, 1944, repealed the Army induction procedure as it existed on January 6, 1944, expressed in a letter relied upon and referred to by the court of appeals in this case. [62-63] The court below referred to Army Regulation 615-500, promulgated on August 10, 1944. [64-65] This regulation was not in effect on March 8, 1944, when petitioner was ordered to report for induction. At the time petitioner was ordered to report for induction, the Selective Service Regulations, which are superior to the Army Regulations, provided that the preinduction physical examination would be acceptable for a period of ninety days.

It was not until July 3, 1944, when Amendment No. 239 to the Selective Service Regulations was promulgated, that the provision for the acceptance upon preinduction physical examination to be effective for ninety days was taken out of the Selective Service Regulations.

On July 3, 1944, Section 629.1 (b) of the Selective Service Regulations reads as follows:

"The armed forces will not accept the results of a preinduction physical examination after 90 days. Therefore, when a registrant's induction will shortly occur and it appears that the date fixed for his induction will be more than 90 days after the date of his preinduction physical examination, he will be given a new preinduction physical examination before he is ordered for induction

unless the Director of Selective Service directs otherwise." (See Amendment No. 239)

Even the Army did not provide for the temporary acceptance of the preinduction physical examination until August 10, 1944. See Army Regulation 615-500 (¶ 15 of AR 615-500, August 10, 1944). But such regulation promulgated on August 10, 1944, was not in effect when petitioner was ordered to report on March 8, 1944.

However, the amendment to the Army Regulations of August 10, 1944, recognized the validity of a preinduction physical examination within ninety days from the date the registrant was ordered to report for induction.

The Selective Training and Service Act and the Selective Service Regulations mandatorily required that the acceptance upon the preinduction physical examination given to the petitioner on January 31, 1944, within ninety days of the date he was ordered to report for induction, was final and conclusive in so far as the exhaustion of administrative remedies was concerned.

Any conflict existing between the Army Regulations and the Selective Service Regulations must be resolved in favor of the Act and Selective Service Regulations. At least, for the purpose of determining the rights of the registrant and in ascertaining whether or not petitioner has exhausted his administrative remedies, it must be held that the regulations which authorize the determination of the final acceptability simultaneously with the order to report for induction are *ultra vires* because contrary to the amendment to the Act. "Thus it seems clear, as we have already said, that the Act, rather than the War Department Regulations or the Articles of War, determines the rights and duties of selectees, as distinguished from inducted men." *Billings* v. *Truesdell,* 321 U. S. 542, 552.

Moreover, Section 629 of the Selective Service Regulations specifically provides that "Every registrant, *before he is ordered* to report for induction, *shall be given a*

preinduction physical examination under the provisions of this part unless (1) he signs a Request for Immediate Induction (Form 219) or (2) he is a delinquent." (Emphasis added)

The position taken by petitioner in this case is supported by the conclusion stated by the Second Circuit Court of Appeals in *United States* v. *Balogh,* 160 F. 2d 999. In its opinion in that case, the court said:

"Indeed, as we read *Gibson* v. *United States,* we should have been right in so ruling, had Balogh been physically examined within ninety days before the induction order was served upon him; and it is because he had not been so examined that the appeal takes on a different face. When the case was before us originally we had not discovered the Army Regulation, passed on August 10, 1944, the important part of which we quote in the margin; nor did either side call it to our attention. This declared that ninety days after a registrant has been examined his examination becomes void, and that he must be reexamined before induction. . . . [¶] So much for the Army Regulation. The Selective Service Regulations which, as we read *Billings* v. *Truesdell,* are paramount to them in authority, contained a provision—originating we cannot learn when—also invalidating a physical examination after ninety days; but it was repealed on July 3, 1944; and, at least after July 23, 1945, the only relevant provision of these regulations read as follows: 'Every registrant before he is ordered to report for induction shall be given a pre-induction physical examination'. . . . [¶] For the foregoing reasons we hold that Balogh had not 'exhausted his administrative remedies' within the meaning of *Falbo* v. *United States, supra,* and it follows that he was not entitled to raise those objections to his induction which we considered and decided in his favor upon the first appeal." *United States* v. *Balogh* (CCA-2) 160 F. 2d 999.

The position taken by the court of appeals in the *Balogh* case was not changed until the dictum of this Court in footnote 4 of *Sunal* v. *Large* was published (67 S. Ct. 1588, 1590) where this Court said: " . . . We also denied certiorari in *Flakowicz* v. *United States,* 325 U. S. 851, but it, like *Falbo* v. *United States, supra,* was one where the administrative remedies had not been exhausted, there being an additional examination which the registrant had not taken. See *Gibson* v. *United States,* 329 U. S. 338." 67 S. Ct. 1588, 1590.

The dictum of the Court appearing in footnote 4 of *Sunal* v. *Large,* 67 S. Ct. 1588, 1590, should not be accepted as binding. It is a loose, incidental statement by the Court, an inadvertent misapprehension of the Selective Service Regulations in respect to preinduction physical examinations, which was unnecessary to the *Sunal* decision. It is quite obvious that the Court in making this statement did not have as clear a view of the Army Regulations as the court of appeals had when the opinion in *United States* v. *Balogh,* 160 F. 2d 999, was written. This Court obviously inadvertently simulated the *Flakowicz* case to the *Falbo* case. However, the Court certainly did not have in view the fact Flakowicz had been accepted upon a preinduction physical examination within ninety days prior to the order to report. As a matter of fact, under the regulations as they existed at the time Flakowicz was ordered to report for induction, he would not have been given another physical examination, but a mere cursory physical inspection.

Since the statement by the Court in footnote 4 of the *Sunal* opinion is merely dictum, it is not binding. Furthermore, it is obviously an inadvertent error made by the Court in respect to the fact of a preinduction physical examination given within ninety days. Therefore it should not be followed. On the contrary, the conclusions reached by the Second Circuit Court of Appeals in respect to the Regulations in *United States* v. *Balogh,* 160 F. 2d 999, should be followed.

It is manifest that in making the inadvertent statement in the *Sunal* case the Court was in the same position in respect to the view of the Regulations that the court of appeals was in when it first considered the *Balogh* case. (157 F. 2d 939) The Army Regulations and the Selective Service Regulations in respect to preinduction physical examinations involved in the *Flakowicz* case were not called to the attention of this Court or discussed by it in the *Sunal* case. It was unnecessary in the *Sunal* and *Kulick* cases to consider or discuss the regulations about the fact of a preinduction physical examination given within ninety days before induction because both Sunal and Kulick reported to the induction station and refused to submit to induction. This was quite different from what Flakowicz did, so plainly the problem that is now posed to this Court in this case was not actually submitted to the Court in the *Sunal* and *Kulick* cases, in reference to the preinduction physical examination's constituting an exhaustion of administrative remedies. Accordingly, this Court is requested to overrule the dictum of the *Sunal* opinion about Flakowicz' not exhausting his administrative remedies and apply the rule that the court of appeals formulated in the *Balogh* case in respect to the exhaustion of administrative remedies upon the taking of preinduction physical examination within ninety days before the order to report for induction.

To hold that one must report for induction and go through the idle ceremony of the routine process leading up to induction, which does not include another examination that would result in the petitioner's discharge, is to "stretch the requirement of exhausting the administrative process beyond any reason supporting it." *Dodez* v. *United States*, 329 U. S. 338, 67 S. Ct. 301, 307. To conclude that Flakowicz had not exhausted his administrative remedies because he failed to report for induction is to do exactly what the Court condemned in *Dodez* v. *United States*. There is an irreconcilable conflict between the statement in foot-

note 4 of the *Sunal* decision and *Levers* v. *Anderson*, 326 U. S. 219. The Court did not overrule *sub silentio* the *Anderson* case in footnote 4 of the *Sunal* opinion. Therefore this Court would be justified in disregarding footnote 4 of the *Sunal* opinion and following the rule prescribed in the *Dodez* and *Anderson* cases.

It is quite obvious, from a reading of the Army Regulations relied upon, that the cursory physical inspection given within ninety days following the acceptance upon the preinduction physical examination would not probably result in the discharge of the petitioner.

The petitioner was held to have failed to have exhausted his administrative remedies, there being "the existence of a possibility that Flakowicz might have been rejected had he obeyed the order to report on March 8th". [64] The mere possibility that a physical checkup "might" disclose "exceptional circumstances which indicate marked deterioration in physical condition, or error or omission by preinduction examining personnel" [63] is not sufficient to constitute exhaustion of administrative remedies.

As to petitioner, the selective process had been completed. He had been selected and the only other thing that he could reasonably and probably suspect was that he go to the Army induction station and go through the formality of refusing to submit to induction. To require one to perform this last step of refusing to submit to induction as a condition to his urging his defense against the indictment is a requirement without reason, vain and needless.

Certainly Congress, in the amendment of the Act requiring the preinduction physical examination and the promulgation of the Selective Service Regulations, did not anticipate that the selectee should report for a cursory physical inspection as a part of the process of exhausting his administrative remedies.

It was the intention of Congress to have the selection finalized completely before the registrant was ordered to

report for induction. Especially is this true when the induction takes place within ninety days of the date of acceptance upon preinduction physical examination.

It is a violent presumption to indulge in that a cursory physical inspection, made within three months of the preinduction physical examination, would reveal a physical defect which had not been discovered when the man had been given a thorough physical examination.

It is true that in the ninety-day interim a registrant might have contracted some sort of social disease, been run over by an automobile, struck by lightning, or otherwise suffered some other catastrophe. But certain it is that the purpose of the cursory physical inspection was to discover only such extraordinary and unusual changes. The cursory physical checkup was not intended to be a part of the selective process ordained by the Selective Service Act and Regulations.

To require a selectee to perform the final step of going to the induction station to submit to a cursory physical inspection as a condition precedent to exhaustion of his administrative remedies is a requirement without reason. It is vain and needless. It is absurd and immaterial. Of course, if a selectee got his leg cut off or suffered some other catastrophe, he would naturally disclose this to the Army and be glad to report.

The fact that the petitioner did not report after being accepted upon the preinduction physical examination should result in a conclusive presumption that he suffered no catastrophe or change in physical condition that would result in his discharge upon a cursory physical inspection on the date he was commanded to appear for induction. To assume that it would or to require petitioner to go through the idle ceremony of reporting, undergoing the cursory physical examination and the formality of refusing to submit to induction, is as absurd and ridiculous as requiring a selectee to stand on his head, walk a tightrope or go

and jump into the lake before he could say that he had exhausted his administrative remedies and qualified himself for judicial review.

The securing of an inspection that may result in rejection only in event petitioner would have shown some changed physical condition is too inadequate a remedy. There was a possibility that lightning might strike petitioner, thus disabling him. But such possibility does not make the remedy adequate. This Court has frequently recognized that the policy underlying the exhaustion-of-remedies doctrine does not require the exhaustion of inadequate remedies. *Hillsborough Twp.* v. *Cromwell,* 326 U. S. 620; *White* v. *Ragen,* 324 U. S. 760; *Driscoll* v. *Edison Co.,* 307 U. S. 104; *Mountain States Co.* v. *Comm'n,* 299 U. S. 167; *Corporation Comm'n* v. *Cary,* 296 U. S. 452; *Pacific Tel. Co.* v. *Kuykendall,* 265 U. S. 106; *Okla. Gas Co.* v. *Russell,* 261 U. S. 290; *Moore* v. *Dempsey,* 261 U. S. 86; *Wallace* v. *Hines,* 253 U. S. 66.

Repeatedly this Court has held that it is not necessary to comply with hollow formalisms and futile remedies before it can be said that administrative remedies have been exhausted and judicial review is available. *Utley* v. *St. Petersburg,* 292 U. S. 106; *Delaware & Hudson Co.* v. *Albany & Susq. R. Co.* (1908) 213 U. S. 435. See also *N. L. R. B.* v. *Carlisle Lumber Co.,* 94 F. 2d 138; *N. L. R. B.* v. *Sunshine Mining Co.,* 110 F. 2d 780. This principle was clearly expressed in Ex parte *Cohen,* 254 F. 711, a draft case arising during the first world war. There it was said, "It is true that he [Cohen] did not appeal to the district board, as perhaps he should have done, but he ought not to be denied his rights to habeas corpus where his personal liberty and nationality are involved because of his failure to have done a vain thing. The local board for some reason took the matter up with the district board, which board approved the action of the local board, and hence to have appealed to them would have been an act of folly." Denying Flakowicz

the defense which he sought to urge, and thus making his conviction certain, is just as serious as the reason relied on in the *Cohen* case to make unnecessary the compliance with vain administrative procedure.

It is respectfully submitted that the petitioner has exhausted his administrative remedies. The selective process being completed upon his acceptance upon the preinduction physical examination within ninety days from the date he was ordered to report for induction, he was acceptable to the armed forces and had exhausted his administrative remedies.

If this Court reaches the conclusion that the administrative remedies were not exhausted at the time petitioner was ordered to report then counsel says that the judgment of the court below, discharging the writ of habeas corpus, can be properly reversed upon other grounds. The issuance of the order to report for induction without previously giving petitioner a preinduction physical examination that would be finally acceptable to the armed forces is an *ultra vires* act in defiance of the amendment to the Act and Section 629.1 of the regulations requiring that preinduction physical examinations be given before the order to report issues.

"It would seem, therefore, that if a Pennsylvania board ordered a citizen and resident of Oregon to report for induction, the defense that it acted beyond its jurisdiction could be interposed in a prosecution under § 11. That case would be comparable to *Tung* v. *United States,* 142 F. 2d 919, where the local board ordered a registrant to report for induction without allowing him the appeal to which he was entitled under the regulations." *Estep* v. *United States,* 327 U. S. 114, 120.

In *Tung* v. *United States* (CCA-1) 142 F. 2d 919, the defendant did not report for induction. Under the Government's argument he had not exhausted his administrative remedies because the order to report was a nullity inas-

much as it was issued in violation of the Act and Regulations. Therefore, for the same reason, it must be held that the order to report in this case is a nullity because it was issued without a preinduction physical examination by the army to finally determine his acceptability, and that it was not necessary for petitioner to report. Furthermore, the decisions in *United States* v. *Peterson* (DC-ND-Calif.) 53 F. Supp. 760, and *United States* v. *Laier* (DC-ND-Calif.) 52 F. Supp. 312, apply here.

Inasmuch as the order to report for induction was void at the time it was issued, in spite of the fact that petitioner may be held not to have exhausted his administrative remedies, as Tung had failed to do in the *Tung* case, the judgment of the court below should nevertheless be reversed. The reversal of the judgment of the court below can rest on this valid ground, even though the administrative remedies are held not to be exhausted.

The court below did not pass upon the question of whether petitioner was entitled to discharge upon the writ of habeas corpus, assuming that he had exhausted his administrative remedies. The court said: "This conclusion renders unnecessary any decision whether habeas corpus would be an available remedy had error occurred in the trial. *Cf. Sunal* v. *Large, supra,* where it was held that habeas corpus would not lie, but Mr. Justice Douglas added: 'Of course, if Sunal and Kulick had pursued the appellate course and failed, their cases would be quite different.'" [65]

Ordinarily it is not necessary for this Court to pass upon questions raised but not decided by the court of appeals. In such cases it is the practice of the Court to remand the case to the court of appeals for further consideration. (*Aetna Cas. and Surety Co.* v. *Flowers,* 67 S. Ct. 798; *Ballard* v. *United States,* 67 S. Ct. 261)

However, this rule should not extend to habeas corpus cases because the statute requires that the prisoner be disposed of according to law and justice.

The mere fact that the court of appeals in this case did not attempt to decide whether habeas corpus was available does not prevent this Court, in event it decides that petitioner exhausted his administrative remedies, from holding (upon the record made before the district court) that the conviction is invalid in spite of the failure of the court of appeals to pass upon the question.

In habeas corpus proceedings this Court is not limited to a consideration of the precise question passed upon by the court of appeals or the district court, but may consider any other ground raised in the record because the statutes require that the prisoners be disposed of as law and justice require. 26 Stat. 827, 28 U. S. C. § 345; *Storti* v. *Massachusetts,* 183 U. S. 138, affirming In re *Storti,* 109 F. 807. This is similar to the power of the Court in admiralty appeals. (*Duche & Sons* v. *Schooner John Twohy,* 255 U. S. 77) Therefore this Court, if it reaches the question, is in this case equally empowered to pass on whether or not habeas corpus is available.

Therefore there is raised upon this petition for writ of certiorari the additional question of whether the petitioner is entitled to relief upon the writ of habeas corpus.

The opinion of the Court in *Sunal* v. *Large,* 67 S. Ct. 1588, supports the argument of petitioner here that he is properly entitled to discharge on the writ of habeas corpus. Sunal and Kulick were denied the benefit of habeas corpus because they had failed to appeal. Here Flakowicz exhausted his appellate remedies. He appealed the judgment of conviction, which was affirmed by the court of appeals. He applied to this Court for review by writ of certiorari, which was denied. The Court in the *Sunal* case said: "Of course, if Sunal and Kulick had pursued the appellate course and failed, their cases would be quite different. But since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile." 67 S. Ct. 1588, 1592.

Conclusion

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under the Judicial Code and the Rules of this Court. To that end the petition for writ of certiorari should be granted so as to correct the errors committed; and petitioner further prays that the judgment rendered by the circuit court of appeals against petitioner be reversed, that of the district court affirmed, and petitioner discharged or, in the alternative, that the judgment be reversed and remanded for further proceedings.

Respectfully submitted,

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